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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-5794

JOSHAWAY DAVIS,

Petitioner,

v.

STATE OF ALASKA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALASKA

RESPONDENT'S BRIEF

CONSTITUTIONAL AMENDMENTS, STATUTES AND RULES INVOLVED

The Sixth Amendment of the United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the

accusations; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

The Fourteenth Amendment of the United States Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Alaska Statute 47.10.080(g) is reproduced at p. 10 *infra.*

Alaska Statute 47.10.090 is reproduced at p. 52, *infra.*

Alaska Statute 47.10.100(a):

> Retention of jurisdiction over minor. (a) The court retains jurisdiction over the case and may at any time stay execution, modify, set aside, revoke, or enlarge a judgment or order, or grant a new hearing, in the exercise of its power of protection over the minor and for his best interest, until he becomes 19 years of age, unless sooner discharged by the court, except that the department may petition the court for continued supervision for an additional one-year period for minors who have not responded to treatment. An application for any of these purposes may be made by the parent, guardian, or custodian acting in behalf of the minor, or the court may, on its own motion, and after reasonable notice to interested parties and the appropriate department, take action which it considers appropriate.

Rule 609(d), Rules of Evidence, 34 L.Ed.2d, No. 5, 69 (1973), is reproduced at p. 53 *infra*.

Alaska R. Juv. P. 23 is reproduced at pp. 10, 53 *infra*.

SUMMARY OF ARGUMENT

Confrontation cases focus on the extent to which the jurors were misled concerning the reliability of the unconfronted testimony. Limiting Davis' cross-examination of Green in the single area of Green's juvenile adjudication and probationary status did mislead Davis' jury to the extent that the foreclosed cross-examination would have impeached Green's credibility. However, this one limitation on the scope of cross-examination of Green did not deprive Davis of due process of law. Davis' jurors still possessed a satisfactory basis for evaluating the truth of the testimony. Clearly, Green's testimony is so trustworthy that full cross-examination would have failed to raise any meaningful doubts in the jurors' minds that simple disclosure of the juvenile record would not have raised, and the juvenile record itself does not significantly impeach the testimony. Moreover, the underlying rationale for prohibiting the disclosure of Green's juvenile record is so strong that Davis' trial would have been fundamentally fair even if the jurors had been significantly misled concerning the reliability of Green's testimony.

STATEMENT OF THE CASE

At approximately 5:00 a.m. on Monday, February 16, 1970, the Polar Bar in Anchorage closed its doors to the Sunday night crowd. (Tr. 101.) Shortly before noon on February 16, three regular patrons of the establishment discovered that one of the bar's doors had been forced open. (Tr. 101-02, 120.) They notified the police, who

investigated and found that a cash box and a jukebox had been broken into and that a small safe weighing approximately 200 pounds and measuring about 25 inches wide and 23 inches deep had been removed from the bar. (R. 10; Tr. 101-03, 282.) The safe contained approximately $1,400 in cash and checks. (Tr. 101, 116-18.)

That afternoon, Jess Straight, an equipment operator at the Anchorage International Airport, stopped on his way home from work at a small store located in the Peters Creek shopping area. (A. 27a; Tr. 298.) His sixteen-year-old stepson, Richard Lee Green, and his eldest brother were with him. They had picked Straight up at work. (Tr. 299.) The three chanced upon Jess Straight's wife (Richard's mother) at the store. (A. 27a; Tr. 298.) Because the Straights had no telephone at home, Mrs. Straight had come to the store to call the Alaska State Troopers to report a safe which had been found near their home by either another of her four sons or by a family acquaintance. (A. 26a; Tr. 146, 298.) After learning about the safe, Jess Straight made the call to the troopers. (Tr. 299.)

The Straights were living at Mile 25 on the Glenn Highway.[1] (A. 26a; Tr. 138, 229.) Their home was located a few hundred yards off the highway and along a little-used side road known as the old Palmer highway. (A. 28a; Tr. 229, 297.) No one lived nearby. (Tr. 229, 297.)

The safe was found approximately 200 yards from the highway in a ditch that ran along the side road. (Tr. 229, 312.) It had been broken into; safe insulation and coins

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[1] Although the record does not disclose the fact, Mile 25 on the Glenn Highway denotes a location 25 miles along the highway from Anchorage toward Fairbanks. Such a description is common knowledge in Anchorage.

were scattered about the area. (R. 11; Tr. 103-04.) Snow had blanketed the ground a day or two before, and one set of tire tracks led along the road at that location. (Tr. 230, 300.) Signs in the snow indicated that the vehicle had stopped for an appreciable period of time near where the safe was found. (A. 32a; Tr. 300-01.) To protect the tracks, Jess Straight felled a tree and laid it across the road as its junction with the highway and placed a barrel in the middle of the road on the other side of the safe. (A. 28a; Tr. 300.)

An Alaska State Trooper was the first police officer at the scene. Richard Green told him that about noon he had seen a late model, metallic blue Chevrolet sedan parked approximately three feet from where the safe had been discovered. (A. 30a, 32a; Tr. 124-25, 217-18, 279-80.) At that time, Green was walking from his home to a house that his stepfather was finishing for their occupancy closer to the highway. (A. 28a-29a.) He saw two Negro men standing behind the car, the shorter of the two wearing a brown or black mackinaw jacket. (R. 10; A. 30a-31a, 40a.) Before Green said anything, the shorter man asked him if he lived nearby and if his father were home. (A. 30a.) Green, while standing about three feet from the man, told him that his father was not at home. (*Id.*) Believing that they were stuck, Green then asked him if they needed help. (*Id.*) The man said no, whereupon Green continued on to the house nearer the road to get some coffee for his mother. (A. 29a-30a.)

Having obtained the coffee, he walked past the two men a few minutes later. Their position was about the same, but this time the shorter man was holding "something like a crowbar." (A. 30a-31a.) No one spoke this time. (A. 31a.) Green did not see the safe. (A. 32a.)

The next morning, Tuesday, February 17, two Anchorage city policemen, aware of the prevalence of late model, metallic blue rental cars and having received a report from the troopers that included Green's description of the automobile, commenced a systematic canvass of Anchorage's car rental agencies. (Tr. 125, 218.) They discovered that the petitioner, Joshaway Davis, had rented a 1969, metallic blue Chevrolet Impala on February 12 and that shortly after noon on the day of the burglary, he had extended his rental contract and paid an additional $50 from an unusually large roll of bills and two rolls of quarters. (R. 10-12; Tr. 226.) The officers then drove past the address the contract listed as Davis' residence. The automobile was parked at that location. (Tr. 226.)

Sometime later, the officers drove out to Mile 25 and Richard Green showed them the safe. (Tr. 227.) Fibers of a reddish-brown material were found caught on the edge of an opening in the safe. (R. 11.) As mentioned above, Green had told the trooper that the man he talked with was wearing a brown or black mackinaw jacket. (R. 10.) Green described the man to the officers, and he expressed a belief that he could identify him upon sight. (Tr. 231, 280.) He doubted that he could identify the other man, however, as the man had been facing sideways. (Tr. 280.)

With the permission of Green's parents, the officers drove him to the Anchorage Police Station. (Tr. 230.) After approximately five minutes at the station, they showed him six photographs of adult, Negro males. (Tr. 230; A. 35a.) The room in which this photo showup occurred was 20 to 25 feet wide and 50 to 60 feet long. (Tr. 232.) Green examined the photographs for 30 seconds to one minute. (Tr. 234.) During that time, one of the two officers worked at his desk packaging evidence

pertinent to another case and the other officer did paperwork at his desk. (Tr. 233.) There were two other officers in the room at the time, but the record contains no indication that they did any work in connection with this burglary investigation. (Tr. 232.) After the photographs were handed to Green, no one else touched them or made any reference to them until Green picked Joshaway Davis' picture as depicting the man with whom he had spoken. (Tr. 234.) Before he identified the photograph, no one indicated to him that Davis was suspected of having committed the crime. (Tr. 231.) The photograph may have been up to 10 years old, and Green testified at trial that it was not exactly representative of the man's description because it did not show his mustache, a mustache that curved down at the edges of his mouth. (R. 10; A. 16a, 35a; Tr. 95-96, 283, 285.) Yet, Green also testified that he had no trouble selecting the picture. (A. 33a.) He was at the police station no more than half an hour. (A. 35a.)

Armed with search warrants the next day, Wednesday, February 18, the Anchorage police officers searched the car and the residence at the address listed on the car rental contract. (Tr. 239, 255; R. 11.) They found paint chips and a tire iron in the trunk of the automobile. Vacuum sweepings were taken from the trunk and from various places inside the car. (Tr. 256.) They arrested Davis inside the residence. (Tr. 139-140.) At a later time, one of the two officers compared the tires on the automobile with the tire tracks along the side road where the safe was found and concluded that the car had made the tracks. (Tr. 147-58.)

An F.B.I. paint analysis expert compared the paint chips found in the trunk of the automobile with paint samples taken from the safe and concluded that they

could have come from the same surface. (Tr. 160-80, 255-73.) The paint consisted of three layers, the top layer being black, the middle layer gray/green, and the bottom layer gray. (Tr. 173, 177-78.) The top two layers had a wrinkle finish. (Tr. 174, 177-78.) By microchemical testing, he discovered that the top two layers were enamel paint and that the bottom coat was a primer. (Tr. 175, 177-78.)

Another F.B.I. special agent, an expert in mineralogy, examined the vacuum sweepings from the trunk of the car and discovered that they contained safe insulation fibers composed of portland cement, diatomaceous earth, and vermiculite mica. (Tr. 192-212, 255-73.) He testified that he had never found this particular composition of materials anywhere but in safes. (Tr. 200.) By comparing the fibers with insulation that had been taken from the stolen safe, he found that they matched. (Tr. 202.) The expert stated that there are many types of safe insulations, and just by examining the fibers from the automobile, he was able to conclude, although not positively, that they had come from a Mosler safe. (Tr. 199, 206.) The stolen safe was a Mosler. (Tr. 103.)

On February 18, 1970, the same day that Davis was arrested, Richard Green picked him out of a seven-man lineup conducted at the Anchorage Police Station. (A. 35a; Tr. 140.) Shortly before the lineup occurred, an assistant district attorney and an assistant public defender who represented Davis at that time discussed how the lineup would be conducted. (Tr. 13, 19, 35, 45-46.) After seeing two or three of the participants, Davis' attorney had to leave for a court appearance, but he sent an investigator who worked for the Public Defender Agency, a 21-year-old college student, to observe the lineup. (Tr. 13-14, 30, 33.) Before dispatching the investigator, the

assistant public defender instructed him in what to look for and told him to take notes. (Tr. 38.) He also told the investigator to call him out of court if he deemed it necessary. (*Id.*) The attorney testified that he had no doubts about the investigator's ability to perform his assignment either before he was sent or after he reported back. (Tr. 40-42.) The trial judge was shown pictures of the lineup. (A. 42a; Tr. 10.) The record contains no indication that the lineup was suggestive.

Green testified that no one gave him any clue as to whom to pick out of the lineup. (A. 41a-42a.) Moreover, he stated that he was certain in his own mind about his identification of Davis as being the man with whom he had talked. (A. 42a-43a.) The only difference in appearance was in the aspect of wearing eyeglasses. (A. 42a.)

Richard Green picked another man out of the lineup as being the second man he had seen. However, as he did so, he told the police officers that he was not certain about the identification. (A. 43a.) The man had been arrested as a suspect, but when Green picked him, the officers informed him that the man could not have been with Davis that day. (A. 16a, 36a.)

Joshaway Davis was indicted on February 24, 1970, on one count of burglary and one count of grand larceny. (A. 1a-2a.) On October 6, 1970, a jury convicted him on both counts after deliberating for seven hours. (Tr. 427-29.)

During the voir dire, the prosecutor orally moved for a protective order preventing Davis from revealing the fact that Richard Green had been adjudicated a delinquent, and was at that time on probation, for the burglary of

two cabins. (A. 4a-5a, 15a.) The judge granted the motion because of Alaska R. Juv. P. 23:[2]

> No adjudication, order, or disposition of a juvenile case shall be admissible in a court not acting in the exercise of juvenile jurisdiction except for use in a presentencing procedure in a criminal case where the superior court, in its discretion, determines that such use is appropriate.

The constitutional propriety of this ruling represents the sole question before this Court.

Although Davis' defense counsel was precluded from revealing Green's delinquency adjudication and probationary status, he announced in his opening statement that the evidence would show that Green "was himself a suspect of this burglary and he believed himself to be a suspect of this burglary." (Tr. 94; *see also* Tr. 95-96, 396, 412.) The record, though, contains no indication that any police officer suspected Green of having any connection with the burglary. Indeed, one of the Anchorage police officers who took Green to the station for the photo-

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[2] An Alaska statute governing the admissibility of juvenile [illegible] reads as follows:

> No adjudication under this chapter upon the status of a child may operate to impose any of the civil disabilities ordinarily imposed by conviction upon a criminal charge, nor may a minor afterward be considered a criminal by the adjudication, nor may the adjudication be afterward deemed a conviction, nor may a minor be charged with or convicted of a crime in a court, except as provided in this chapter. The commitment and placement of a child and evidence given in the court are not admissible as evidence against the minor in a subsequent case or proceeding in any other court, nor does the commitment and placement or evidence operate to disqualify a minor in a future civil service examination or appointment in the state.

Alaska Stat. 47.10.080(g).

graph identification testified that he had never met the boy before driving out to his home and that he did not suspect him in any way. (A. 26a; Tr. 137-38.) As for Green believing himself to be a suspect, the following cross-examination constitutes his only testimony concerning the extent to which he was under pressure to identify someone in order to exonerate himself:

By Mr. Wagstaff:

Q. Mr. Green, as I understand it, you went down to the police station by yourself, or at least as far as your family is concerned, but in the company of 2 police officers, Investigator Gray and Investigator Weaver?

A. Yes, sir.

Q. Were you upset at all by the fact that this safe was found on your property?

A. No, sir.

Q. Did you feel that they might in some way suspect you of this?

A. No.

Q. Did you feel uncomfortable about this though?

A. No, not really.

Q. The fact that a safe was found on your property?

A. No.

Q. Did you suspect for a moment that the police might somehow think that you were involved in this?

A. I thought they might ask a few questions is all.

Q. Did that thought ever enter your mind that you—the police might think that you were somehow connected with this?

MR. RIPLEY: I'm going to object to this, Your Honor, asked and answered. It's a minor paraphrase of questions that have been asked and answered.

THE COURT: It's paraphrased again. I'll allow it, just hopefully we don't get too deep in repeating it, but I think you are repeating the question. He may answer it if he can.

A. No, it didn't really bother me, no.

Q. Well, but–

A. I mean, you know, it didn't–it didn't come into my mind as worrying me, you know.

Q. That really wasn't–wasn't my question, Mr. Green. Did you think that–not whether it worried you so much or not, but did you feel that there was a possibility that the police might somehow think that you had something to do with this, that they might have that in their mind, not that you–

A. That come across my mind, yes, sir.

Q. That did not cross your mind?

A. Yes.

Q. So as I understand it you went down to the–you drove in with the police in–in their car from mile 25, Glenn Highway down to the city police station?

A. Yes, sir.

Q. And then went into the investigator's room with Investigator Gray and Investigator Weaver?

A. Yeah.

Q. And they started asking you questions about–about the incident, is that correct?

A. Yeah.

Q. Had you ever been questioned like that before by any law enforcement officers?

A. No.
(A. 33a-34a.)[3]

ARGUMENT

I

INTRODUCTION

The confrontation and compulsory process clauses of the sixth amendment guard against undue risks to an accurate verdict that attend certain limitations on a defendant's means of defending himself. These clauses are embodied in the fourteenth amendment right to due process of law.

> The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process.

Chambers v. Mississippi, ___ U.S. ___, ___, 35 L.Ed.2d 303, 308 (1972).

The trial judge limited Davis' means of defense when he prevented him from impeaching Green's credibility by fully cross-examining Green and revealing to the jury Green's juvenile delinquency adjudication and probation-

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[3]Davis states in his brief, "Counsel asked if he had ever been questioned before by law enforcement officers; his answer was no (A. 33-34)." (Petitioner's Brief at 10.) The specific question was, "Had you ever been questioned *like that* before by any law enforcement officers?" (A. 34a (emphasis added).) His negative response was not untruthful. The inquiry referred to being questioned as a prospective witness, not as a prospective accused. Green's juvenile record does not show that any of his testimony was untruthful.

ary status.[4] However, this impediment to Davis' defense is not of sufficient magnitude to have deprived him of due process of law. He was not denied "a fair opportunity to defend against the State's accusations." *Id.* This conclusion is true even though the jurors were somewhat misled concerning the reliability of Green's testimony.

Because cross-examination can reveal hidden defects in testimony, jurors may be misled concerning the testimony's reliability whenever cross-examination is restricted. They will always be misled to some degree when facts that impeach the testimony are kept from them. However, very few evidentiary rulings which keep an accused from fully cross-examining or frustrate him in disclosing impeaching facts rise to the level of constitutional error.[5] Even when the testimony that goes before the jury is critical to the government's case,

> the question . . . must be not whether one can somehow imagine the jury "in a better position," but whether . . . the defendant's trial will still afford the trier of fact a satisfactory basis for evaluating the truth of the [testimony].

California v. Green, 399 U.S. 149, 160-61, 26 L.Ed.2d 489, 498 (1970).

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[4]The only value further cross-examination of Green and disclosure of Green's juvenile record would have had to Davis is impeachment value. That Green himself committed the burglary would not have been a viable defense. *See* pp. 36-37 *infra; compare* Chambers v. Mississippi,____U.S.____, 35 L.Ed.2d 303 (1972).

[5]Our experience with the sixth amendment has taught us that it does not mean what it says. Despite the constitutional provision, it is not the applicable law that the accused is entitled in all circumstances to confront the witnesses against him.

Griswold, *The Due Process Revolution and Confrontation,* 119 U. Penn. L. Rev. 711, 728 (1971).

Green's testimony formed a substantial part of the State's case, and cross-examination in the area of Green's juvenile record would have placed the jurors "in a better position" to evaluate his testimony.[6] Nevertheless, Davis' jurors were not unduly misled concerning Davis' culpability because they still possessed "a satisfactory basis for evaluating the truth of the [testimony]." *Id.* The restriction placed on Davis' cross-examination of Green was not one of the "threats to a fair trial" against which "the Confrontation Clause was directed." *Bruton v. United States,* 391 U.S. 123, 136, 20 L.Ed.2d 476, 485 (1968).

II

HEARSAY CONFRONTATION CASES

Most confrontation cases involve hearsay.

Out-of-court statements are traditionally excluded because they lack the *conventional indicia of reliability;* they are usually not made under oath or other circumstances that impress the speaker with the solemnity of his statements; the declarant's word is not subject to cross-examination; and he is not available in order that his demeanor and credibility may be assessed by the jury.

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[6]The protective order was broad enough to prevent Davis from calling other witnesses to establish Green's juvenile record. (A. 21a-22a); *cf.* Chambers v. Mississippi, *supra;* Webb v. Texas, ___ U.S. ___, 34 L.Ed.2d 330 (1972); Washington v. Texas, 388 U.S. 14, 18 L.Ed.2d 1019 (1967). Had there been full cross-examination, however, it is not likely that other witnesses would have been needed. Nothing indicates that Green would have failed to reveal truthfully everything about his juvenile adjudication and probationary status had he been requested to do so.

Chambers v. Mississippi, supra at __, 35 L.Ed.2d at 311 (emphasis added). If hearsay is not excluded, a state defendant can be deprived of due process because of his inability to test its truth by the absent "conventional indicia of reliability."

> [C]ertain kinds of hearsay ... are at once so damaging, so suspect, and yet so difficult to discount, that jurors cannot be trusted to give such evidence the minimal weight it logically deserves, *whatever* instructions the trial judge might give.

Bruton v. United States, supra at 138, 20 L.Ed.2d at 486 (Stewart, J., concurring) (emphasis in original); *see also id.* at 136 n.12, 20 L.Ed.2d at 485 n.12

> (Surely the suggestion is not that Pointer v Texas, for example, be repudiated and that all hearsay evidence be admissible so long as the jury is instructed to weigh it in light of "all the dangers of inaccuracy which characterize hearsay generally.").

Because jurors may consider hearsay to be more trustworthy than circumstances show it to be, testing its accuracy by the absent "conventional indicia of reliability" can be considerably important both to the accused and to the accuracy of the verdict.[7] There is always a

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[7]Keeping a defendant from cross-examining or presenting evidence can deprive him of due process of law when a judge or an administrative tribunal is the fact finder.

The case of *In re* Oliver, 92 L.Ed. 682, 333 U.S. 257 (1948), involved a man who testified before a secret Ohio grand jury composed of a lone judge. Based upon the testimony of a subsequent witness, the judge held the man in contempt of court without giving him an opportunity to present a defense or cross-examine the other witness. This Court held that the defendant had been denied a constitutional opportunity to defend himself. By not having heard Oliver's defense, including a cross-examination of the other witness, the judge was not able to decide fairly Oliver's guilt or innocence.

chance that if the defendant were able to test the hearsay, the jurors would ascribe less weight to it. This possibility increases as the possibility that the missing "conventional indicia of reliability" would disclose hidden defects increases.

During the trial in *Dutton v. Evans*, 400 U.S. 74, 27 L.Ed.2d 213 (1970), a witness named Shaw related an out-of-court statement supposedly made by his one-time cellmate Williams when Williams returned to their cell after being arraigned for murder. Shaw testified that he asked Williams how he had fared in court and Williams responded that if it were not for "Evans, we wouldn't be in this now." *Id.* at 77, 27 L.Ed. at 220. Williams was an alleged accomplice of Evans and was convicted of the

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In Brookhart v. Janis, 384 U.S. 1, 16 L.Ed.2d 314 (1966), Brookhart was convicted by a judge of forgery and uttering forged instruments. The State needed to present only prima facie proof of guilt and no cross-examination was allowed. This Court, after finding that Brookhart had not waived a full trial, held that the truncated proceedings denied him due process of law.

In Willner v. Committee on Character and Fitness, 373 U.S. 96, 10 L.Ed.2d 224 (1963), the New York Bar Association rejected Willner without a hearing. This Court found a denial of procedural due process, and in doing so stated,

> If the Court of Appeals based its decision on the ground that denying petitioner the right of confrontation did not violate due process, we also hold that it erred for the reasons earlier stated.

Id. at 106, 10 L.Ed.2d at 231; *cf.* Reilly v. Pinkus, 338 U.S. 269, 94 L.Ed. 63 (1949).

In Jenkins v. McKeithen, 395 U.S. 411, 23 L.Ed.2d 404 (1969), this Court reviewed the procedures of the Louisiana Labor Management Commission of Inquiry. Without giving Jenkins any opportunity to cross-examine or to compel the attendance of witnesses, the Commission decided whether he had committed a crime, the determination carrying various adverse consequences. This Court found a denial of due process.

murders before Evans was tried. He had never been cross-examined about this hearsay statement, and he was not called at Evans' trial. The Georgia trial court allowed the hearsay under a Georgia statute that admits statements made by a co-conspirator, even if they are made after the co-conspirator's arrest. This Court concluded that the jurors were not unconstitutionally misled concerning Evans' culpability even though at no time was the hearsay ever tested by any of the "conventional indicia of reliability," *i.e.*, cross-examination, demeanor observation, and an oath. *Chambers v. Mississippi, supra* at __, 35 L.Ed.2d at 311.

The trustworthy appearance of the hearsay indicated that if Williams actually made the statement, neither cross-examination nor an oath would have changed its substance, nor would demeanor observation by Chambers' jurors have lessened its impact on their minds.

> First, this statement contained no express assertion about past fact, and consequently it carried on its face a warning to the jury against giving the statement undue weight. Second, Williams' personal knowledge of the identity and role of the other participants in the triple murder is abundantly established by Truett's testimony and by Williams' prior conviction. It is inconceivable that cross-examination could have shown that Williams was not in a position to know whether or not Evans was involved in the murder. Third, the possibility that Williams' statement was founded on faulty recollection is remote in the extreme. Fourth, the circumstances under which Williams made the statement were such as to give reason to suppose that Williams did not misrepresent Evans' involvement in the crime. These circumstances go beyond a showing that Williams had no apparent reason to lie to Shaw. His statement was spontaneous, and it was against

> his penal interest to make it. These are indicia of reliability which have been widely viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant.

Dutton v. Evans, supra at 88-89, 27 L.Ed.2d at 227.[8]

The trustworthiness of the hearsay was dubious, though, as to whether Williams actually made the statement. There existed "serious doubt . . . whether the conversation which Shaw related ever took place." *Id.* at 87 n.18, 27 L.Ed.2d at 226 n.18. However, the jurors were made aware of this "serious doubt." Williams'

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[8]The fact that Evans could have called Williams to the stand added to the trustworthiness of the hearsay. His failure to do so indicated that the statement was made and that it was accurate, the logical assumption being that Evans would have called Williams if cross-examination would have shown the hearsay to be less incriminating than it appeared.

The force of this assumption is diminished somewhat because Evans' counsel chose not to subpoena Williams because of a belief that Williams would stand on his right not to incriminate himself and refuse to answer questions about the alleged statement. Dutton v. Evans, 400 U.S. 74, 102 n.4, 27 L.Ed.2d 213, 235 n.4 (1970) (Marshall, J., dissenting). However, because there was some possibility that Williams would have answered, *id.* at 102, 27 L.Ed. at 234-35 (Marshall, J., dissenting), the reliability of the hearsay was somewhat enhanced by the fact that Evans could have brought him to the trial.

With respect to whether Williams made the statement, this Court stated the following:

> Of course Evans had the right to subpoena witnesses, including Williams, whose testimony might show the statement had not been made. Counsel for Evans informed us at oral argument that he could have subpoenaed Williams but had concluded that this course would not be in the best interest of his client.

Id. at 88 n.19, 27 L.Ed.2d at 226-27 n.19.

testimony on this point was not sufficiently important to Evans' defense to cause a denial of his constitutional right of confrontation.

One of the reasons why the restrictions on Evans' defense were not unconstitutional stems from the fact that as hearsay becomes less incriminating in the jurors' minds and less important in their deliberations, the consideration of whether the jurors are misled concerning the testimony's reliability decreases in importance.[9] *See, e.g., Frazier v. Cupp,* 394 U.S. 731, 22 L.Ed.2d 684 (1969); *cf. Namet v. United States,* 373 U.S. 179, 10 L.Ed.2d 278 (1963). In light of the fact that the jurors learned of the "serious doubt" and in light of the mass of other incriminating evidence that the jury heard, this Court concluded that the hearsay was not "evidence in any sense 'crucial' or 'devastating,' " but rather it was "of peripheral significance at most." *Dutton v. Evans, supra* at 87, 27 L.Ed.2d at 226.

Conversely, the less a jury is misled about the reliability of hearsay testimony, the greater can be the testimony's impact. Even "crucial" or "devastating" hearsay may be admitted into evidence if the lack of full and effective cross-examination, for example, does not cause the jury to be too misled.

California v. Green, supra, is a case in which the hearsay was so important that even with it, there was some doubt that the conviction was based on legally

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[9]When considering what effect additional confrontation would have had on the jurors' minds, the standard to measure against is the average jury. *See* Schneble v. Florida, ___ U.S.___, ___, 31 L.Ed.2d 340, 345 (1972).

sufficient evidence.[10] A juvenile, who had been arrested eleven days earlier for selling marijuana, testified at Green's preliminary hearing that Green had supplied him with marijuana. At Green's trial for furnishing narcotics to a minor, the juvenile was called as the principal State's witness, and after he professed a lack of memory, his prior testimony was introduced as substantive evidence under a prior inconsistent statement exception to the hearsay rule.

Green's counsel extensively cross-examined the juvenile at the preliminary hearing, and this Court stated as dictum that the hearsay would have been admissible as evidence against Green even if the State had been unable to produce the juvenile at trial.[11] *Id.* at 165, 26 L.Ed.2d

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[10] Due process not only protects against inaccurate verdicts by prohibiting serious limitations on a person's means of defending himself, it does

> not permi[t] a conviction based on no evidence, Thompson v City of Louisville, 362 US 199, 4 L Ed 2d 654, 80 S Ct 624, 80 ALR2d 1355 (1960); Nixon v Herdon, 273 US 536, 71 L Ed 759, 47 S Ct 446 (1927), or on evidence so unreliable and untrustworthy that it may be said that the accused had been tried by a kangaroo court. Cf. In re Oliver, supra; Turner v Louisiana, 379 US 466, 13 L Ed 2d 424, 85 S Ct 546 (1965).

California v. Green, 399 U.S. 149, 186 n.20, 26 L.Ed.2d 489, 513 n.20 (1970) (Harlan, J., concurring); *see also id.* at 163 n.15, 26 L.Ed.2d at 500 n.15 ("While we may agree that considerations of due process, wholly apart from the Confrontation Clause, might prevent convictions where a reliable basis is totally lacking, see Thompson v Louisville"); *cf. In re* Winship, 397 U.S. 358, 25 L.Ed.2d 368 (1970).

[11] The juvenile first revealed that Green was his supplier four days after the juvenile was arrested. This hearsay statement to the police was also introduced. At the trial, the boy's professed lack of memory prevented Green's counsel from effectively cross-examining the juvenile concerning this statement. This Court

at 501. The more trustworthy hearsay appears, the less likely it is that the absent cross-examination or demeanor observation would have cast doubt on the reliability of the hearsay or that the absent oath would have induced the declarant to make a different statement. The prior cross-examination and oath clothed the juvenile's prior testimony in sufficient "indicia of 'reliability' " to justify a conclusion that the jurors would not have been unduly misled concerning the reliability of the hearsay even if they had never seen and heard the juvenile. *Id.* at 161, 26 L.Ed.2d at 499; *see also Mancusi v. Stubbs*, ___ U.S. ___, ___, 33 L.Ed.2d 293, 303 (1972)

> (Since there was an adequate opportunity to cross-examine Holm at the first trial, and counsel for Stubbs availed himself of that opportunity, the transcript of Holm's testimony in the first trial bore sufficient "indicia of reliability" and afforded a "trier of fact a satisfactory basis for evaluating the truth of the prior statement," . . . .);

Mattox v. United States, 156 U.S. 237, 39 L.Ed. 409 (1895) (prior trial testimony of deceased witness admissible).

The juvenile's testimony at trial cast considerable doubt on the trustworthiness of his prior testimony, but because the jurors heard the trial testimony, they were not misled about this aspect of the hearsay's reliability. Also, the trial testimony lessened the hearsay's incriminatory sting. Thus, just as it was significant in *Dutton v. Evans* that the jurors knew of the likelihood that Williams

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remanded to California for a determination of whether the introduction of this hearsay into evidence was constitutional error, and, if so, whether the error was harmless because of the admissible preliminary hearing testimony. California v. Green, *supra* at 168-70, 26 L.Ed.2d at 503-04; *cf.* note 19 *infra*.

never made the statement to Shaw, it was significant that the jurors in *California v. Green* heard the juvenile tell the "different, inconsistent story." *California v. Green, supra* at 159, 26 L.Ed.2d at 497.

Hearsay need not be more trustworthy than untrustworthy to pass constitutional muster. In *Nelson v. O'Niel*, 402 U.S. 622, 29 L.Ed.2d 222 (1971), a police officer testified that Nelson's co-defendant made an unsworn, oral confession to him that implicated Nelson as his confederate. This confession is the type of hearsay that is so untrustworthy and so damaging that even though the jurors were instructed not to consider it in assessing Nelson's guilt, had the co-defendant not been cross-examined, the jurors would have been unconstitutionally misled concerning Nelson's complicity. *E.g., Roberts v. Russell*, 392 U.S. 293, 20 L.Ed.2d 1100 (1968); *Bruton v. United States, supra.* As it was, the co-defendant took the stand, denied having made the alleged confession, and denied the accuracy of the assertions comprising it. Because the co-defendant's testimony adequately informed the jurors of the hearsay's reliability and greatly reduced the impact of the hearsay, Nelson's right of confrontation was not abridged.

III

NON-HEARSAY CONFRONTATION CASES

Confrontation problems are not confined to hearsay cases. Non-hearsay testimony that is not tested by full and effective cross-examination can critically mislead a jury concerning the defendant's culpability.

In *Chambers v. Mississippi, supra,* Chambers sought to show that a man named McDonald murdered the police officer. One of McDonald's life-long friends testified that he saw McDonald shoot the officer, and another witness

testified that he observed McDonald with a pistol immediately after the shooting. Chambers called McDonald to the stand and elicited the fact that McDonald had signed a sworn confession.

On cross-examination, the prosecutor brought out that McDonald had repudiated the confession prior to trial and that he still repudiated it. McDonald even furnished an alibi. Under Mississippi law, Chambers was unable then to treat McDonald as an adverse witness and subject his "damning repudiation and alibi to cross-examination." *Id.* at ___, 35 L.Ed.2d at 308.

Cross-examination would have been extremely informative to the jurors. They would have learned facts that both severely impeached McDonald's testimony and provided strong affirmative support for Chambers' defense that McDonald committed the crime. Also, considering the nature of these facts, serious hidden defects in McDonald's testimony may well have surfaced during cross-examination.

A man named Sam Hardin testified

> that, on the night of the shooting, he spent the late evening hours with McDonald at a friend's house after their return from the hospital and that, while driving McDonald home late that night, McDonald stated that he shot Liberty. The State objected to the admission of this testimony on the ground that it was hearsay. The trial court sustained the objection.

Id. at ___, 35 L.Ed.2d at 307. The trial court then ordered the jury to disregard this testimony. *Id.* at ___ n.4, 35 L.Ed.2d at 307 n.4.

Outside the jury's presence, a man named Berkley Turner

recounted his conversations with McDonald while they were riding with James Williams to take Chambers to the hospital. When asked whether McDonald said anything regarding the shooting of Liberty, Turner testified that McDonald told him that he "shot him." Turner further stated that one week later, when he met McDonald at a friend's house, McDonald reminded him of their prior conversation and urged Turner not to "mess him up."

Id. at ___, 35 L.Ed.2d at 307. Because of another hearsay objection, the judge refused to allow the jury to hear this evidence.

A third witness was McDonald's neighbor.

They had been friends for about 25 years. Although Carter had not been in Woodville on the evening of the shooting, he stated that he learned about it the next morning from McDonald. That same day he and McDonald walked out to a well near McDonald's house and there McDonald told him that he was the one who shot Officer Liberty. Carter testified that McDonald also told him that he had disposed of the .22-caliber revolver later that night. He further testified that several weeks after the shooting he accompanied McDonald to Natchez where McDonald purchased another .22 pistol to replace the one he had discarded.[5] The jury was not allowed to hear Carter's testimony. Chambers urged that these statements were admissible, the State objected, and the court sustained the objection.

Id. at ___, 35 L.Ed.2d at 307.08.[12] "The trial court did

[12] 5. A gun dealer from Natchez testified that McDonald had made two purchases. The witness' business records indicated that McDonald purchased a nine-shot .22-caliber revolver about a year prior to the murder. He purchased a different style .22 three weeks after Liberty's death.

Chambers v. Mississippi, *supra* at ___ n.5, 35 L.Ed.2d at 307 n.5.

not state why it was excluding the evidence but the State Supreme Court indicated that it was excluded as hearsay." *Id.* at ___ n.6, 35 L.Ed.2d at 308 n.6.

McDonald's renunciation of his confession, reinforced by his alibi, was testimony "seriously adverse to Chambers" as it squarely disputed Chambers' defense that McDonald had committed the crime, and this testimony went to the jury without any cross-examination.[13] *Id.* at ___, 35 L.Ed.2d at 310. Chambers

> was not allowed to test the witness' recollection, to probe into the details of his alibi, or to "sift" his conscience so that the jury might judge for itself whether McDonald's testimony was worthy of belief.

Id. at ___, 35 L.Ed.2d at 308-09. Moreover, McDonald's testimony went to the jurors without their being able to consider the extremely impeaching and exculpatory evidence that the three witnesses were prepared to present. Consequently, the jurors were considerably misled concerning Chambers' culpability.

There was no acceptable justification for this damage to the "integrity of the fact finding process." *Id.* at ___, 35 L.Ed.2d at 309. This Court noted that the "voucher" or "party witness" rule that barred cross-examination "bears little present relationship to the realities of the

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[13] Chambers' ability to question McDonald on direct was no substitute for cross-examination. He was "restricted in the scope of his direct examination by the [voucher] rule's corollary requirement that the party calling the witness is bound by anything he might say." Chambers v. Mississippi, *supra* at ___, 35 L.Ed.2d at 310.

criminal process,"[14] *id.* at ___, 35 L.Ed.2d at 309, and that the hearsay rules that barred the three witness' testimony served no "valid State purpose" because of the fact that McDonald's hearsay statements which the witnesses would have related

> were originally made and subsequently offered at trial under circumstances that provided considerable assurance of their reliability.

Id. at ___, 35 L.Ed.2d at 311-12. This Court

> conclude[d] that the exclusion of this critical evidence, coupled with the State's refusal to permit Chambers to cross-examine McDonald, denied him a trial in accord with traditional and fundamental standards of due process.

Id. at ___, 35 L.Ed.2d at 313.

McDonald was not cross-examined at all and the jurors never learned of facts that severely impeached his testimony, but even when there is some cross-examination and no known impeaching facts are kept from the jurors, they still may be seriously misguided concerning non-hearsay testimony.[15] In *Smith v. Illinois*,

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[14] This Court noted that Mississippi did not seek "to defend the rule or explain its underlying rationale," Chambers v. Mississippi, *supra* at 35 L.Ed.2d at 310, and that

> [t]he "voucher" rule has been condemned as archaic, irrational, and potentially destructive of the truth gathering process.

Id. at __ n.8, 35 L.Ed.2d at 309 n.8.

[15] Jurors can be seriously misled concerning the reliability of non-hearsay testimony even when *no* cross-examination is forbidden and *no* fact that impeaches the testimony is kept from the jury. Some eyewitness identifications are grounded on such suggestive circumstances that no cross-examination or other impeachment can adequately alert jurors to their unreliability. If

390 U.S. 129, 19 L.Ed.2d 956 (1968),

> the principal witness against the petitioner was a man who identified himself on direct examination as "James Jordan." This witness testified that he had purchased a bag of heroin from the petitioner in a restaurant with marked money provided by two Chicago police officers. The officers corroborated part of this testimony, but only this witness and the petitioner testified to the crucial events inside the restaurant, and the petitioner's version of those events was entirely different. The only real question at the trial, therefore, was the relative credibility of the petitioner and this prosecution witness.
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> On cross-examination this witness was asked whether "James Jordan" was his real name. He admitted, over the prosecutor's objection, that it was not. He was then asked what his correct name was, and the court sustained the prosecutor's objection to the question. Later the witness was asked where he lived, and again the court sustained the prosecutor's objection to the question.

Id. at 130-31, 19 L.Ed.2d at 958 (footnotes omitted). This Court commented as follows:

> In the present case there was not, to be sure, a complete denial of all right of cross-examination. But the petitioner was denied the right to ask the principal prosecution witness either his name or where he lived, although the witness admitted that the name he had first given was false. Yet when the credibility of a witness is in issue, the very starting

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jurors learn of an identification that is important to the State's case and it is possible that they are greatly misled concerning its reliability, due process is denied. *E.g.*, Neil v. Biggers, ___ U.S. ___, 34 L.Ed.2d 401 (1972); *see also* California v. Green, *supra* at 186 n.20, 26 L.Ed.2d at 513 n.20 (Harlan, J., concurring).

> point in "exposing falsehood and bringing out the truth" through cross-examination must necessarily be to ask the witness who he is and where he lives. The witness' name and address open countless avenues of in-court examination and out-of-court investigation. To forbid this most rudimentary inquiry at the threshold is effectively to emasculate the right of cross-examination itself.

Id. at 131, 19 L.Ed.2d at 959 (footnote omitted).

After observing, " 'It is the essence of a fair trial that reasonable latitude be given the cross-examiner,' " this Court found a denial of confrontation. *Id.* at 132, 19 L.Ed.2d 959, quoting from *Alford v. United States*, 282 U.S. 687, 692, 75 L.Ed. 624, 627 (1931). No reason was given for limiting the cross-examination, *Smith v. Illinois*, *supra* at 133 n.8, 19 L.Ed.2d at 960 n.8; the informer's testimony was critical to the State's case; persons who make controlled narcotic purchases are, in general, extremely vulnerable to cross-examination; and Smith's cross-examination was "emasculated."[16] *Id.* at 131, 19

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[16] The government's desire to shield informers can create constitutional problems not only when an informer takes the stand, but when an accused is kept from cross-examining a witness about an informer. For example, in McCray v. Illinois, 386 U.S. 300, 18 L.Ed.2d 62 (1967), the question was whether the Illinois trial judge violated the accused's right of confrontation at an evidentiary suppression hearing when he prevented cross-examination of police officers concerning the identity of a "reliable informant."

> The arresting officers in this case testified, in open court, fully and in precise detail as to what the informer told them and as to why they had reason to believe his information was trustworthy. Each officer was under oath. Each was subjected to searching cross-examination. The judge was obviously satisfied that each was telling the truth, and for that reason he exercised the discretion conferred upon him by the established law of Illinois to respect the informer's privilege.

L.Ed.2d at 959; *cf.* Graham, *The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One*, 8 Crim. L. Bull. 99, 135 (1972) ("[P]ermitting a witness to testify under an alias not only interferes with the attack on his credibility, but smacks as well of the despised 'anonymous informant.' ").

In a concurring opinion, Justice White observed that the personal safety of a witness can justify immunity from answering questions on cross-examination, but because "the State gave no reasons justifying the refusal to answer a quite usual and proper question," he joined in "the Court's judgment and its opinion." *Smith v. Illinois, supra* at 134, 19 L.Ed.2d at 960 (White, J., concurring).

The decision in *Smith v. Illinois* relies on *Alford v. United States, supra.* Alford was convicted of using the mails to defraud.

> In the course of the trial the government called as a witness a former employee of petitioner. On direct examination he gave damaging testimony with respect to various transactions of accused, including conversations with the witness when others were not present, and statements of accused to salesmen under his direction, whom the witness did not identify. Upon cross-examination questions seeking to elicit the witness' place of residence were

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Id. at 313, 18 L.Ed.2d at 72. In light of these indicia of reliability and the need for concealing the informer's identity, this Court found satisfactory confrontation.

Also, a jury may be unconstitutionally misled concerning an accused's culpability when the informer privilege is used to prevent him from calling a police informer. Branzburg v. Hayes,___ U.S. __ , 33 L.Ed.2d 626 (1972) ("[T]heir identity cannot be concealed from the defendant when it is critical to his case."); McCray v. Illinois, *supra.*

> excluded on the government's objection that they were immaterial and not proper cross-examination.

Id. at 688, 75 L.Ed. at 626. The federal trial judge sustained the objection even though defense counsel "had been informed that the witness was then in the custody of the federal authorities . . . ." *Id.* at 690, 75 L.Ed. at 627. It was quite possible that cross-examination would have shown

> that his testimony was biased because given under promise or expectation of immunity, or under the coercive effect of his detention by officers of the United States, which was conducting the present prosecution.

Id. at 693, 75 L.Ed. at 628.

The danger was great that the *Alford* jury was unfairly misled concerning the testimony's reliability and the reason for limiting the cross-examination—to protect the witness from the discredit that attends a showing of any criminal charge—was weak, the witness being an adult in custody. Also, the testimony was "damaging." *Id.* at 688, 75 L.Ed. at 626. Accordingly, in what appears to be a supervisory rather than a constitutional ruling, this Court held that the restriction on cross-examination "was an abuse of discretion and prejudicial error."[17] *Id.* at 694,

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[17] The Court in Smith v. Illinois viewed the error in *Alford* as being of constitutional magnitude. Smith v. Illinois, 390 U.S. 129, 133, 19 L.Ed.2d 956, 960 (1968). The Court in *Alford* did say, "Cross-examination of a witness is a matter of right," and, "It is the essence of a fair trial that reasonable latitude be given the cross-examiner. . . ." Alford v. United States, 282 U.S. 687, 691-92, 75 L.Ed. 624, 627-28 (1931). Also, one of the cases cited in *Alford* mentions the sixth amendment, although it does so by saying, "This error involves no question under the Sixth Amendment of the Constitution." Furlong v. United States, 10 F.2d 492, 494 (8th Cir. 1926), cited in Alford v. United States, *supra* at 692,

75 L.Ed. at 629; *cf. Gordon v. United States*, 344 U.S. 414, 97 L.Ed. 447 (1953).

IV

LIMITING DAVIS' CROSS-EXAMINATION OF GREEN DID NOT SIGNIFICANTLY MISLEAD THE JURY CONCERNING THE RELIABILITY OF GREEN'S TESTIMONY.

Confrontation cases center around the extent to which the curtailment of the accused's means of defending himself caused the jurors to be misled concerning his guilt [illegible]nce.[18] The two components of this determina-

75 L.Ed. at 627. However, no other authority cited in *Alford* even mentions the sixth amendment, and a civil case is cited to the opinion's language "Cross-examination of a witness is a matter of right." *Cf.* California v. Green, *supra* at 179 n.14, 26 L.Ed. at 509 n.14 (Harlan, J., concurring) ("Alford v. United States . . . (right to cross-examine not treated as a denial of confrontation)."); Glass v. United States, 315 U.S. 60, 86 L.Ed. 680 (1942) ("The alleged undue limitation of cross-examination merits scant attention. The extent of such examination rests in the sound discretion of the trial court. Alford v. United States"). Nevertheless, the possibility that the jury was dangerously misled appears even stronger in *Alford* than in *Smith*. The witness' testimony in *Alford* was damaging and the jurors never learned that the critical witness' testimony might have been

> biased becaused given under promise or expectation of immunity, or under the coercive effect of his detention by officers of the United States, which was conducting the present prosecution.

Alford v. United States, *supra* at 693, 75 L.Ed. at 628. This is the same type of bias that makes co-defendant hearsay confessions so untrustworthy that even instructions to disregard usually will not suffice. *See, e.g.*, Bruton v. United States, 391 U.S. 123, 20 L.Ed.2d 476 (1968).

[18] This is also true of the compulsory process cases. Thus, to the extent that the instant case carries compulsory process overtones, the ultimate legal analysis is the same. *See* note 6 *supra*.

tion are the damaging nature of the unconfronted testimony and the degree to which the jurors were misled concerning the testimony's reliability.[19] Although Green's testimony was damaging, the jury that convicted Davis was not unduly misled concerning its reliability.

Green's testimony was immediately subjected to cross-examination which was limited only in the area of his juvenile record; he rendered his testimony under oath in

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[19] In Harrington v. California, 395 U.S. 250, 23 L.Ed.2d 284 (1969), this Court stated that a constitutional *Bruton*-type error had occurred even though the harmful impact of the co-defendant's confession was so slight that the error was harmless beyond a reasonable doubt, a fact that saved the conviction. *Harrington* suggests that at least in the realm of *Bruton*, the question of whether a constitutional error has occurred is answered by looking solely at the extent to which the jurors were misled concerning the reliability of the unconfronted testimony, not looking at all at the damaging impact of the testimony. That is, the inquiry does not expand to consider whether the jurors were misled concerning the accused's culpability.

Harrington preceded Dutton v. Evans, *supra*, the first confrontation case to dwell on the aptness of the testimony's damaging impact when a determination of error needs to be made. Also, this Court stated in the *Bruton* harmless error case of Schneble v. Florida, *supra*, "The admission into evidence of these statements, therefore, was *at most* harmless error." *Id.* at ___, 31 L.Ed.2d at 345 (emphasis added). In Brown v. United States, ___ U.S. ___, 36 L.Ed.2d 208 (1973), this Court did not have to consider whether the introduction of the co-defendant's confession constituted error because of the fact that the Solicitor General conceded that the confession was improperly admitted under *Bruton*. *See also* Frazier v. Cupp, 394 U.S. 731, 22 L.Ed.2d 684 (1969) (no error because co-defendant's confession not sufficiently placed before the jury); *cf.* Bruton v. United States, *supra* at 127-28, 20 L.Ed.2d at 480 ("Plainly, the introduction of Evans' confession added substantial, perhaps even critical, weight to the Government's case in a form not subject to cross-examination . . . .").

surroundings designed to impress him "with the solemnity of his statements"; and he was "available in order that his demeanor and credibility [could] be assessed by the jury."[20] *Chambers v. Mississippi, supra* at ___, 35 L.Ed.2d at 311; *see also California v. Green, supra* at 158, 26 L.Ed.2d at 497. Therefore, all of the "conventional indicia of reliability" safeguards embodied in the confrontation clause—full and effective cross-examination, a courtroom oath, and the jury's ability to observe demeanor—were undiminished with the one exception of cross-examination in the area of Green's juvenile record.[21] *Chambers v. Mississippi, supra* at ___, 35 L.Ed.2d at 311. In spite of the fact that cross-examination was limited in this one area and the jurors never learned of Green's juvenile record, they possessed an adequate foundation for fairly determining Davis' culpability.

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[20] Also, Davis was present when Green testified. One of the basic rights guaranteed by the confrontation clause is the accused's right to be present in the courtroom at every stage of his trial. Illinois v. Allen, 397 U.S. 337, 25 L.Ed.2d 353 (1970); *see also* Snyder v. Massachusetts, 291 U.S. 97, 78 L.Ed. 674 (1934). Moreover, Green accused Davis in his presence. The face-to-face aspect of confrontation was considerably important to the framers of the sixth amendment. Larkin, *The Right of Confrontation: What Next?*, 1 Texas Tech. L. Rev. 67, 69-70 (1969); *see generally* Pollitt, *The Right of Confrontation: Its History and Modern Dress*, 8 J. Pub. L. 381 (1959).

[21] The present case should be contrasted with Dutton v. Evans, *supra*, in which the right of confrontation was not violated even though not one of these confrontation safeguards existed to any extent.

A. Further Cross-Examination by Davis Would Not Have Disclosed Significant Hidden Defects in Green's Testimony.

Dean Wigmore characterized cross-examination as "the greatest legal engine ever invented for the discovery of truth." 5 Wigmore, *Evidence* §1367, at 29 (3d ed. 1940). Any curtailment of cross-examination may result in a jury's being misled in determining the testimony's reliability. When cross-examination is completely denied or emasculated, this possibility is oftentimes quite real.[22] However, the possibility that the denied cross-examination would have revealed hidden defects in the testimony diminishes with increased cross-examination.

Because Green's juvenile record is so minimally impeaching and because cross-examination was so extensive, it seems highly unlikely that cross-examining Green about his juvenile record would have revealed any significant hidden defects. In other words, it appears that Green's testimony would not have suffered more by full cross-examination than it would have by disclosure of his juvenile record through another witness.

If a witness has a motive to testify as he did, cross-examination on the subject of his motive quite likely will disclose hidden defects in the testimony. However, the fact that Green was on probation does not indicate that he had a meaningful motive that may have colored his testimony. Perhaps Green was more likely to benefit some time in the future from having helped the police than he would have been had he never been

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[22] This is especially true when there has been a large-scale denial of cross-examination and the defendant is prevented from inquiring into known facts that severely impeach the testimony's plausibility. *See* Chambers v. Mississippi, *supra;* Alford v. United States, *supra.*

apprehended by legal authorities, but such a vague possibility of benefit is hardly significant impeaching evidence. As for a possible immediate benefit, Green's juvenile record does not indicate that he was receiving any favors for his help. There is no indication that Green testified to stave off a probation revocation or other adverse modification of his judgment. *Cf.* Alaska Stat. 47.10.100(a). Helping the police solve crimes and convict criminals was obviously not one of his conditions of probation.[23] Although Green may have faced a probation revocation had he been involved in the Polar Bar burglary, the record clearly demonstrates that full cross-examination would not have uncovered that Green was in any danger of being accused of the burglary.

The only evidence linking Green to the crime was the safe's having been found near his parents' property. It is highly unlikely that a burglar would dispose of a stolen safe alongside a road near his house. Green's old pickup had not brought the safe there. (A. 29a-30a.) Nothing in the record indicates that the police even suspected Green of having committed the burglary. The only officer to testify on this subject specifically stated that he did not suspect Green. (A. 26a; Tr. 137-38.) None of Green's actions indicated guilt. Green testified that although it "came across [his] mind" "that there was a possibility that the police might somehow think that [he] had something to do with" the safe, he was not "upset at all by the fact that the safe was found on" his parents' property. (A. 33a-34a.)

The strength of Green's testimony further shows that cross-examination would not have revealed any hidden defects in it. Green's story to the trooper, to the

[23] The State will furnish the conditions of probation, and even Green's entire juvenile file, if this Court so requests.

Anchorage police officers, and to the jurors, a story that did not waiver or vary, was so amply corroborated that it would have been extremely trustworthy evidence even if Green had had a strong motive either to fabricate or to hastily make an identification and then to stick to it. It was so corroborated that Green's credibility was not a serious issue in this case, and would not have been a serious issue even if there had been full cross-examination. *Compare e.g., Chambers v. Mississippi, supra; Smith v. Illinois, supra; Alford v. United States, supra.*

After Green told the trooper about seeing the metallic blue, late model Chevrolet sedan at approximately noon on the day of the burglary, the city police officers discovered that Davis had rented a 1969, metallic blue Chevrolet Impala four days before the burglary and had extended his rental contract and paid an additional $50 from an unusually large roll of bills and two rolls of quarters.[24] (R. 10-12.) Paint chips and safe insulation fibers which obviously came from the stolen safe were found in the trunk of the automobile when it was searched outside Davis' residence two days after the burglary. (Tr. 166-80, 192-212, 239, 255-73.) Nothing in the record indicates that Green's description to the police officers of the man he talked with failed to match Davis' appearance. Green told the trooper that the man was wearing a brown or black mackinaw jacket, and one of the Anchorage police officers later found fibers of a

[24] The jury never learned of the way Davis paid for the extended rental contract, but the fact that they never learned is irrelevant to an assessment of the trustworthiness of the testimony for the purpose of determining whether additional cross-examination might have revealed hidden defects.

reddish-brown material caught on the safe.[25] (R. 10-11; *see also* A. 31a.) The rental car's snow tires matched the set of tracks located where the safe was found. (Tr. 147-58.)

The record is replete with evidence that the photograph and lineup identifications were not suggestively induced. (A. 33a, 35a, 41a-43a; Tr. 11-48, 232-34.) Before Green picked Davis' photograph, no one indicated to him in any way that Davis was suspected of having committed the crime. (Tr. 231.) He had no trouble selecting the photograph even though it was perhaps 10 years old and differed from Davis' appearance at the time of his arrest in that it did not show him with a mustache. (R. 10; A. 16a, 33a, 35a; Tr. 95-96, 283, 285.)

The day after the photo showup, an assistant public defender, who was Davis' attorney at the time, helped organize the lineup, and an investigator for the Public Defender Agency, who had been instructed by the attorney in what to look for, observed the lineup itself. (Tr. 13-14, 19, 28-48, 59.) Photographs of the lineup were shown to the trial judge. (A. 42a; Tr. 10.) Green testified that no one gave him any clue concerning whom to select from the lineup, and he said that he was certain in his own mind about his selection. (A. 41a-43a.)

Green's photograph, lineup, and in-court identifications of Davis were grounded on an excellent "prior opportunity to observe."[26] *United States v. Wade*, 388

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[25] The jury never learned about the fibers that were caught on the safe. *See* note 24 *supra*.

[26] The lineup was not unconstitutionally conducted. It preceded the indictment by several days. (A. 1a-2a, 35a; Tr. 140); Kirby v. Illinois, 406 U.S. 682, 32 L.Ed.2d 411 (1972). Also, even if the lineup were considered a "critical stage" of Davis' proceedings and he did not waive his right to be represented, he was constitutionally represented at the lineup even though his representative was not an attorney.

U.S. 218, 241, 18 L.Ed.2d 1149, 1165 (1967). Green closely observed Davis when they first met along the side road. It was daylight and they spoke from a distance of only three feet. (A. 29a-40a.) There was no "discrepancy between [Green's pre-photo-showup] description and the defendant's actual description." *United States v. Wade, supra* at 241, 18 L.Ed.2d at 1165. Green never failed "to identify the defendant on [any] occasion." "[T]he lapse of time between the alleged [encounter] and the [photograph and] lineup identification[s]" *id.*, was merely one and two days respectively. (A. 42a-43a.) "[T]hose facts

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This Court has given certain suspects the right to counsel at a lineup to afford them an opportunity to "reconstruct the manner and mode of lineup identification for judge or jury at trial." United States v. Wade, 388 U.S. 218, 230, 18 L.Ed.2d 1149, 1159 (1967). In so doing, the Court noted that

> neither witnesses nor lineup participants are apt to be alert for conditions prejudicial to the suspect. And if they were, it would likely be of scant benefit to the suspect since neither witnesses nor lineup participants are likely to be schooled in the detection of suggestive influences.

Id. A lawyer's schooling, of course, suits him for the task of detecting suggestive influences, but his role in performing this task is not as professionally demanding as is his role at other "critical" stages, such as at the trial itself.

This Court indicated in *Wade* that the right to have an attorney present at a "critical" lineup may not always exist. For example, this Court said,

> Legislative or other regulations, such as those of local police departments, which eliminate the risks of abuse and unintentional suggestions at lineup proceedings and the impediments to meaningful confrontation at trial may also remove the basis for regarding the stage as "critical."

Id. at 239, 18 L.Ed.2d at 1164. The investigator for the Public Defender Agency would have been able to adequately reconstruct the lineup at trial if Davis had desired him to do so.

which . . . are disclosed concerning the conduct of [the photo showup and] the lineup" contain absolutely no indication that any impermissible suggestion occurred. *United States v. Wade, supra* at 241, 18 L.Ed.2d at 1165; *cf.* note 15 *supra.*

In addition to all of these facts demonstrating the trustworthiness of Green's testimony, there exists the additional important fact that Green gave his testimony under oath and before the jury. Also, the facts that Green was extensively cross-examined and that he was circumspectly interrogated about the possible motive further show that full cross-examination would not have disclosed any significant hidden defects in his testimony.[27] The following language from the Alaska Supreme Court

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[27] Green's testimony is considerably more trustworthy than are most dying declarations. The unreliability of dying declarations has long been recognized:

> The history of criminal trials is replete with instances where witnesses even in the agonies of death have, through malice, misapprehension, or weakness of mind, made declarations that were inconsistent with the actual facts . . . .

Carver v. United States, 164 U.S. 694, 697, 41 L.Ed. 602, 603 (1897); *see also* Note, *Confrontation and the Hearsay Rule*, 75 Yale L.J. 1434, 1436-37 (1966). Yet this Court has consistently voiced blanket approval of the dying declaration exception to the hearsay rule. Dutton v. Evans, *supra* at 80, 27 L.Ed.2d at 222; California v. Green, *supra*, at 182, 26 L.Ed.2d at 511 (Harlan, J., concurring); Pointer v. Texas, 380 U.S. 400, 407, 13 L.Ed.2d 923, 928 (1965); Snyder v. Massachusetts, *supra* at 107, 78 L.Ed. at 679; Dowdell v. United States, 221 U.S. 325, 330, 55 L.Ed. 753, 757 (1911); Kirby v. United States, 174 U.S. 47, 61, 43 L.Ed. 890, 896 (1899); Robertson v. Baldwin, 165 U.S. 275, 282, 41 L.Ed. 715, 717 (1897); Mattox v. United States, 156 U.S. 237, 243-44, 39 L.Ed. 409, 411 (1895); Mattox v. United States, 146 U.S. 140, 151-52, 36 L.Ed. 917, 921-22 (1892).

opinion discusses this one part of Green's cross-examination:

> [W]hile the judge did not permit questions directly disclosing the fact that the juvenile had a prior record, our reading of the trial transcript convinces us that counsel for the defendant was able adequately to question the juvenile in considerable detail concerning the possibility of bias or motive. Council [sic] alluded both to possible ulterior motives of the juvenile and to the possibility that the juvenile's identification arose from apprehension. The juvenile responded that he felt no anxiety or apprehension about the safe being discovered near his home. While this denial was possibly self-serving, the suggestion was nonetheless brought to the attention of the jury, and that body was afforded the opportunity to observe the demeanor of the juvenile and pass on his credibility.

(A. 60a.)

B. Green's Juvenile Record Does Not Substantially Impeach Green's Testimony.

The jury was somewhat misled concerning Green's credibility simply by not having heard about his juvenile record. However, this inroad on the integrity of the fact-finding process did not deprive Davis of due process of law.[28] This conclusion is true even though Green's testimony substantially added to the State's case.

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[28] In Giles v. Maryland, 385 U.S. 66, 17 L.Ed.2d 737 (1967), a Maryland juvenile records secrecy law was used to keep the jury from hearing evidence that impeached a rape victim. This Court remanded to the Maryland Supreme Court for a reconsideration of

Burglary is a larcenous crime. The fact that Green had been adjudicated a delinquent for committing two burglaries was relevant to his veracity at trial, but the relevancy was quite weak. It may be said that, in general, a person who has committed two burglaries is less believable than a person who has not. However, when there is no motive to prevaricate, it does not seem much more likely that a burglar, as opposed to a non-burglar, would perjure himself in order to help convict someone he does not know.

Davis' primary allegation is that Green's juvenile record impeaches his testimony because it shows that Green possessed an interest in quickly foisting the blame onto someone else and keeping it there. As discussed above, however, in reference to what possible hidden doubts further cross-examination might have cast on Green's testimony, Green's juvenile record does not indicate that a meaningful motive existed. *See* pp. 35-37 *supra.* Moreover, Green's testimony is so amply corroborated that even a strong motive would not have seriously impeached his credibility.

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various evidentiary rulings, including the juvenile secrecy rulings. The dissenting opinion contains the following language:

> My Brother White does not suggest, as I think he cannot, that any of the rulings which he suspects to have been erroneous were deficient under any known federal standard.

Id. at 113, 17 L.Ed.2d at 767 (Harlan, J., dissenting).

V

THE STRONG PURPOSES BEHIND ALASKA'S JUVENILE RECORDS SECRECY RULE FURTHER SHOW THAT DAVIS' TRIAL WAS FUNDAMENTALLY FAIR.

Whether or not the jurors were misguided concerning Davis' culpability is not the only consideration in judging the fairness of his trial. It is relevant to consider the underlying rationale for the judge's refusal to allow full cross-examination and disclosure of Green's juvenile record.

A. Hearsay and Non-Hearsay Cases Which Consider the Underlying Rationale for Limiting the Accused's Defense

This Court in *Chambers v. Mississippi, supra,* stressed the fact that the "voucher" rule which foreclosed all cross-examination of McDonald "bears no present relationship to the realities of the criminal process." *Id.* at __, 35 L.Ed.2d at 309. As for the hearsay rulings that foreclosed bringing McDonald's prior confessions and admissions to the jury, this Court noted that they served no "valid state purpose." *Id.* at ___, 35 L.Ed.2d at 311; *see also Smith v. Illinois, supra* (no reason for the restriction on cross-examination); *Alford v. United States, supra* (same); *cf. Brooks v. Tennessee,* 406 U.S. 605, 32 L.Ed.2d 358 (1972).

In *Mattox v. United States,* 156 U.S., *supra,* this Court permitted an evidentiary ruling that kept facts from the jury which would have significantly impeached hearsay testimony. At an earlier trial for committing murder in Indian country, two witnesses, who were fully cross-examined by Mattox, presented the strongest proof

against him. Both of these witnesses died before the later trial, and the jury was given transcribed copies of their testimony.

Two persons were prepared at the later trial to testify that one of the deceased witnesses had said that his testimony had been given under duress and was untrue in essential particulars. The federal judge prevented the jury from hearing these witnesses, and because of the rationale underlying the judge's ruling, this Court held the ruling not to be reversible error. The underlying rationale for keeping the two impeaching witnesses off the stand was that the temptation is almost irresistible in criminal cases to present false evidence in order to destroy hearsay testimony when the hearsay declarant is unavailable to reveal the falsehood. *See also Chambers v. Mississippi, supra* at __ & n.21, 35 L.Ed.2d at 312 & n.21.

In what does not purport to be a constitutional ruling, this Court in *Carver v. United States*, 164 U.S. 694, 41 L.Ed. 602 (1897), held that this purpose for excluding impeaching evidence did not save the trial court's evidentiary ruling from being reversible error. At the trial—also for murder in Indian territory—the jury learned of the victim's dying declaration that Carver had shot him. The judge refused to allow Carver to present witnesses who would have testified that the deceased had made statements to them indicating an unintentional shooting. The court discussed the *Mattox* opinion and held,

> We are not inclined to extend it to the case of a dying declaration, where the defendant has no opportunity by cross-examination to show that by reason of mental or physical weakness or actual hostility felt toward him, the deceased may have been mistaken.

Id. at 698, 41 L.Ed. at 603.

In *Washington v. Texas*, 388 U.S. 14, 18 L.Ed.2d 1019 (1967), the rationale of preventing perjury did not justify the state trial judge's keeping an alleged accomplice from testifying. The boyfriend of Washington's ex-sweetheart had been fatally shot, and Washington's alleged accomplice was convicted and sentenced before Washington was tried. At Washington's trial, the accomplice was prepared to testify that Washington had fled the scene of the crime after unsuccessfully trying to get him to leave and before the shot was fired. Because the jurors did not hear this witness, they were markedly misled concerning Washington's culpability. This Court ruled the refusal to grant compulsory process a denial of due process of law. *See also Bruton v. United States, supra* at 133-34, 20 L.Ed.2d at 483-84 (reasons for joint trial do not justify the "clearly harmful practice" because "viable alternatives" to joint trial exist).

As the danger of harmfully misleading the jury increases, so does the need to closely examine the reason behind the evidentiary ruling. *See Chambers v. Mississippi, supra* at ___, 35 L.Ed.2d at 309

> (Of course, the right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process. E.g., Mancusi v Stubbs, 408 US 204, 33 L Ed 2d 293, 92 S Ct 2308 (1972). But its denial or significant diminution calls into question the ultimate "integrity of the fact-finding process" and requires that the competing interest be closely examined.)

The converse is equally as true. If the jury is not pointedly misled, the trial will be fundamentally fair even though the underlying rationale for the ruling is weak. In *Washington v. Texas*, the very real possibility of perjury

did not justify Texas' keeping the slayer of Washington's ex-sweetheart off the stand, but the much weaker reason of conserving time, for example, may justify preventing a defendant from delving into a prosecution witness' bad acts.[29] *Cf. United States v. Dorfman*, 470 F.2d 246 (2d Cir. 1972), *cert. denied*, 13 Crim. L. Rptr. 4019 (1973).

The same principle applies in determining whether hearsay has been constitutionally admitted. The underlying reason for not producing the declarant is significant in determining the trial's fundamental fairness, and his availability becomes more important as the danger of misleading the jury increases. For example, it usually does not matter whether the person who prepared a business record is available, but the availability of the victim may make a constitutional difference.

In *Barber v. Page*, 390 U.S. 719, 20 L.Ed.2d 255 (1968), Barber and Woods were jointly charged with armed robbery and one attorney represented both of them at their preliminary hearing. At the hearing, Woods waived his right not to incriminate himself and testified,

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[29]Davis asserts the following:

> The developing case law of this Court under the Sixth Amendment firmly establishes the right to cross examine with only Fifth Amendment exceptions.

(Petitioner's Brief at 16.)

> The only protection a witness is entitled to when he testifies against another in a criminal case is that found within the Fifth Amendment.

(*Id.* at 22.)

> [A]ny considerations concerning the nonconstitutional protection of an accusatory witness must necessarily yield to the confrontation rights of the Sixth Amendment.

(*Id.* at 18.)

incriminating Barber. Before Woods testified, the attorney withdrew as his counsel, but did not cross-examine Woods, although an attorney for a third co-defendant did. When Barber was brought to trial, Woods was in a federal prison in Texas and was never called. The judge permitted the introduction of Woods' prior testimony.

Even though Woods' confession was given in court and subjected to cross-examination by a defense attorney, it was still highly suspect. A confession by a man awaiting trial that implicates another is extremely suspect; *e.g.*, *Bruton v. United States, supra;* and

> [a] preliminary hearing is ordinarily a much less searching exploration into the merits than a trial, simply because its function is the more limited one of determining whether probable cause exists to hold the accused for trial.

Barber v. Page, supra at 725, 20 L.Ed.2d at 260.

Although the hearsay character of the prior testimony was available for the jurors' consideration, they most likely gave the testimony more weight than it deserved. *See Bruton v. United States, supra* at 138, 20 L.Ed.2d at 486 (Stewart, J., concurring). Furthermore, Woods' confession formed "the principal evidence" against Barber. *Barber v. Page, supra* at 720, 20 L.Ed.2d at 257. Woods was readily available by subpoena, and this Court ruled,

> While there may be some justification for holding that the opportunity for cross-examination of a witness at a preliminary hearing satisfies the demands of the confrontation clause where the witness is shown to be actually unavailable, this is not, as we have pointed out, such a case.

Id. at 725-26, 20 L.Ed.2d at 260; *see also California v. Green, supra* at 165, 26 L.Ed.2d at 501 ("Porter's

statement would, we think, have been admissible at trial even in Porter's absence if Porter had been actually unavailable despite good-faith efforts of the State to produce him."); *Berger v. California*, 393 U.S. 314, 21 L.Ed.2d 508 (1969) (preliminary hearing testimony of victim—clearly crucial evidence—introduced although he could have been subpoenaed).

An accomplice's preliminary hearing testimony that had been cross-examined by a defense attorney was introduced into evidence in *Motes v. United States*, 178 U.S. 458, 44 L.Ed. 1150 (1900). The accomplice was unavailable at the trial because of the negligence of government officers, and this Court held that although such reasons as death, insanity, and sickness would have been sufficient to excuse the absence of the accomplice, confrontation was denied in this case.[30]

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[30] Prosecutorial misconduct or negligence is a relevant factor in determining whether a trial is fundamentally fair. Thus, this Court mentioned as a distinguishing characteristic in Dutton v. Evans, *supra*, that that case did

> not involve any suggestion of prosecutorial misconduct or even negligence, as did Pointer, Douglas, and Barber.

Id. at 87, 27 L.Ed.2d at 226; *see also* Frazier v. Cupp, *supra* at 737, 22 L.Ed.2d at 691 ("Accordingly, there is no need to decide whether the type of prosecutorial misconduct alleged to have occurred would have been sufficient to constitute reversible constitutional error.").

> Douglas v. Alabama, 380 U.S. 415, 13 L.Ed.2d 934 (1965), was a case of prosecutorial misconduct. By placing the witness on the stand and reading in the confession, the prosecutor, in effect, increased the reliability of the confession in the jury's eyes in view of the witness' apparent acquiescence as opposed to repudiation.

California v. Green, *supra* at 186 n.20, 26 L.Ed.2d at 513 n.20 (Harlan, J., concurring).

Evidently, the "suggestion of prosecutorial misconduct or even negligence" in *Pointer* and *Barber* was the lack in both cases of a

In *Mancusi v. Stubbs, supra,*

> the principal prosecutorial witness, one Alex Holm, did not appear. Instead, Holm's testimony was introduced through a transcript of a previous trial on the same charge.

Id. at __, 33 L.Ed.2d at 305 (Marshall, J., dissenting).

> The circumstances surrounding the giving of Alex Holm's testimony at the 1954 trial were significantly more conducive to an assurance of reliability than were those obtaining in Barber v. Page, supra. The 1954 Tennessee proceeding was a trial of a serious felony on the merits, conducted in a court of record before a jury, rather than before a magistrate. Stubbs was represented by counsel who would and did effectively cross-examine prosecution witnesses.

Id. at __, 33 L.Ed.2d at 302.

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good faith effort to produce an essential witness. (This Court did not mention the lack of a good faith effort in *Pointer*, but

> the state where the trial was held and the state where the witness had gone were signatories to the Uniform Act to Secure the Attendance of Witnesses from Without the State, which, in effect, allows interstate service of process.

Note, *Confrontation and the Hearsay Rule*, 75 Yale L.J. 1434, 1440 (1966); *see also* California v. Green, *supra* at 186 n.20, 26 L.Ed.2d at 513 n.20 ("[T]here was no showing that the witness [in *Pointer*] could not have been made available for cross-examination.").) The hearsay in both cases was very untrustworthy and extremely damaging. If the government seeks to convict with such testimony when the accuser can be put on the stand, the action can be classified as "prosecutorial misconduct or even negligence," whereas the failure to call the declarant of official records, for example, cannot be so characterized.

Keeping Green's juvenile record from the jury cannot be characterized as either misconduct or negligence on the part of the prosecutor. The record was kept out pursuant to a court rule designed to protect witnesses.

Alex Holm was a permanent resident of Sweden at the time of the second trial and Tennessee

> was powerless to compel his attendance at the second trial, either through its own process or through established procedures depending on the voluntary assistance of another government.

Id. at ___, 33 L.Ed.2d at 301. This Court concluded that the Constitution did not require Tennessee even to notify "Mr. Holm that the trial was scheduled; and invit[e] him to come at his own expense." *Id.* at 307 (Marshall, J., dissenting); *see also Dutton v. Evans, supra* (hearsay declarant not necessary even though he could have been subpoenaed).

B. Reasons Underlying Alaska's Juvenile Records Secrecy Rule

The underlying rationale for limiting Davis' defense need not be closely examined because the jury was not significantly misled concerning Green's credibility, a fact that itself demonstrates the fundamental fairness of Davis' trial. Yet close examination of the ruling that kept Green's juvenile record from the jury and prevented full cross-examination shows that the ruling served a State purpose important enough to sustain even close cases.

One of the most revered foundations of America's juvenile court system is the concept that the offender should be shielded from public awareness of his contacts with authorities.

> [T]here is a convincing amount of evidence that publicity not only fails to deter, but often provides encouragement for further and original delinquency, publicity being the end sought by the delinquent.

Geis, *Publicity and Juvenile Court Proceedings*, 30 Rocky Mt. L. Rev. 101, 124-25 (1958).

> [A]s a result of disclosure of his juvenile record, the youth is often barred from employment, or is limited to menial jobs lacking in responsibility and fulfillment.

Comment, *Sealing of Juvenile Court Records*, 54 Minn. L. Rev. 433, 434-35 (1969).

> [W]e have firm data that virtually all juvenile delinquents are not persistent or confirmed male-factors; that they drift in and out of delinquent situations; that they are quite plastic and malleable creatures at this stage of their existence. In fact, this is the major reason why we have an institution such as the juvenile court. It should also be the major reason why we will not permit the publication of the names or other identifying data about young persons who appear before the juvenile court or who are arrested for offenses constituting juvenile delinquency.

Geis, *Identifying Delinquents in the Press*, 29 Fed. Probation 44, 45 (Dec. 1965) (footnote omitted).

Alaska rigorously protects its juvenile delinquents from publicity.[31] By statute, court permission is required before any information prepared by a state or federal employee pertaining to a minor can be released to anyone except persons charged with making a preliminary court investigation. The statute reads as follows:

> *Records.* (a) The court shall make and keep records of all cases brought before it. The court's official records may be inspected only with the court's

[31] While the supposed effectiveness of laws that protect juveniles from disclosure of their deviational behavior has been judged by this Court to be "more rhetoric than reality," this Court has never indicated that successful laws of this type are undesirable. *In re* Gault, 387 U.S. 1, 24, 18 L.Ed.2d 527, 544 (1967).

permission and only by persons having a legitimate interest in them. All information and social records pertaining to a minor and prepared in the discharge of his official duty by an employee of the court or by a federal, state or city agency are privileged and may not be disclosed directly or indirectly to anyone without the court's permission. However, a state or city law-enforcement agency shall disclose information regarding a case which is needed by the person or agency charged with making a preliminary investigation for the information of the court. Within 30 days of the date on which a minor reaches his 18th birthday or, if the court retains jurisdiction of a minor past his 18th birthday, within 30 days of the date on which the court relinquishes jurisdiction over the minor, the court shall order sealed all the court's official records, information and social records pertaining to that minor, as well as records of all criminal proceedings against him and punishments assessed against him, except for traffic offenses. No person may use records so sealed for any purpose except that the court may order their use for good cause shown or may order their use by an officer of the court in making a presentencing report for the court.

(b) The name or picture of a minor under the jurisdiction of the court may not be made public by a newspaper, radio, or television station in connection with the minor's status as a delinquent or dependent child, except as authorized by order of the court.

(c) A person who violates a provision of this section is guilty of a misdemeanor, and upon conviction is punishable by a fine of not more than

> $500 or by imprisonment for not more than one year or by both.

Alaska Stat. 47.10.090.[32]

Specifically regarding the release of juvenile records in court, the Alaska Legislature has dictated, "The commitment and placement of a child and evidence given in the court are not admissible as evidence against the minor in a subsequent case or proceeding in any other court . . .", Alaska Stat. 47.10.080(g), and the Alaska Supreme Court has promulgated a rule that states,

> No adjudication, order, or disposition of a juvenile case shall be admissible in a court not acting in the exercise of juvenile jurisdiction except for use in a presentencing procedure in a criminal case where the superior court, in its discretion, determines that such use is appropriate.

Alaska R. Juv. P. 23.[33] The court rule, unlike Alaska Stat.

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[32] Until 1972, this statute did not contain the sealing provisions:

[33] Rule 609(d) of the Rules of Evidence for United States Courts and Magistrates reads as follows:

> Evidence of juvenile adjudications is generally not admissible under this rule. The judge may, however, allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the judge is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

Rules of Evidence, 34 L.Ed.2d, No. 5, 69 (1973).

The advisory committee's note on this rule appears as follows:

> The prevailing view has been that a juvenile adjudication is not useable for impeachment. . . . This conclusion was based upon a variety of circumstances. By virtue of its informality, frequently diminished quantum of required proof, and other departures from accepted standards for criminal trials under the theory of parens patriae, the juvenile adjudication was considered to lack the precision and general probative value

47.10.080(g), leaves no room for interpretation and binds the judge unless, of course, adherence to it deprives the accused of a constitutional right.[34]

of the criminal conviction. While In re Gault, 387 US 1, 87 S Ct. 1428, 18 L Ed 2d 527 (1967), no doubt eliminates these characteristics insofar as objectionable, other obstacles remain. Practical problems of administration are raised by the common provisions in juvenile legislation that records be kept confidential and that they be destroyed after a short time. While Gault was skeptical as to the realities of confidentiality of juvenile records, it also saw no constitutional obstacles to improvement. 387 US at 25, 87 S Ct 1428. See also Note, Rights and Rehabilitation in the Juvenile Courts, 67 Colum L Rev 281, 289 (1967). In addition, policy considerations much akin to those which dictate exclusion of adult convictions after rehabilitation has been established strongly suggest a rule of excluding juvenile adjudications. Admittedly, however, the rehabilitative process may in a given case be a demonstrated failure, or the strategic importance of a given witness may be so great as to require the overriding of general policy in the interests of particular justice. See Giles v Maryland, 386 US 66, 87 S Ct 793, 17 L Ed 2d 737 (1967). Wigmore was outspoken in his condemnation of the disallowance of juvenile adjudications to impeach, especially when the witness is the complainant in a case of molesting a minor. 1 Wigmore §196; 3 *id.* §§924a, 980. The rule recognizes discretion in the judge to effect an accommodation among these various factors by departing from the general principle of exclusion. In deference to the general pattern and policy of juvenile statutes, however, no discretion is accorded when the witness is the accused in a criminal case.

Id. at 71.

Of course federal rules of evidence do not necessarily establish constitutional confrontation boundaries. Dutton v. Evans, *supra* at 80-81, 83, 27 L.Ed.2d at 222-24 ("For this Court has never indicated that the limited contours of the hearsay exception in federal conspiracy trials are required by the Sixth Amendment's Confrontation Clause."); California v. Green, *supra* at 163 n.15, 26 L.Ed.2d at 500 n.15.

[34] For example, Davis' jury might have been unconstitutionally misled had Green been facing charges and had his testimony been uncorroborated.

Green, who was only 17 years of age at the time he testified, was then being rehabilitated by probation. He had been expelled from school for skipping classes the year before, and at the time of trial he was working for the Neighborhood Youth Corps in Chugiak. (A. 27a.) Under Alaska's procedures for ensuring tight secrecy, he had good reason to believe that his juvenile record would not be exposed. Disclosure of his record might have shattered his confidence in the State's sincerity in fostering his rehabilitation.

In addition, disclosure of his record could well have had other adverse effects on Green's rehabilitation. Although inevitably some people will learn of a delinquent's escapades, disclosure of Green's record at the trial would have carried the potential of wide dissemination. It was certainly newsworthy that the State's star witness, who happened to live near the place where the safe was found, had been adjudicated a delinquent for acts of burglary. *Cf.* Alaska Stat. 47.10.090(d).

Davis points out that the potential for wide dissemination would have been lessened by excluding the public during disclosure. However, even if this extraordinary measure of excluding the public had been employed, a measure that itself carries constitutional overtones, *see generally* Case Note, 1 Fordham Urban L.J. 308 (1972), twelve additional persons would have learned of Green's record. This occurrence obviously would have created a greater risk of harmful dissemination.

Not only would disclosing Green's record have had an adverse rehabilitative effect on him, if juvenile records were revealed in very many cases, persons with such records would be less likely to help stop criminal activity or aid the government in obtaining convictions. *Cf.* 3a Wigmore, *Evidence* §921, at 724 (Chadbourn rev. 1970); Ash, *On Witnesses: A Radical Critique of Criminal Court*

Procedures, 48 Notre Dame Law. 386 (1972). In states with juvenile record secrecy laws akin to Alaska's, a juvenile record will likely remain secret for all practical purposes; and if being a witness for the government means at least partially opening the door to a closet of skeletons, a person might well hesitate to stop a crime or report its occurrence.

The State thus had strong underlying reasons for limiting cross-examination and preventing disclosure of Green's juvenile record. Even if the evidentiary ruling in question had caused the jury to be so misled concerning Davis' culpability that a denial of due process loomed close in this case, the underlying rationale for the ruling would show that the trial was fair.

CONCLUSION

The prohibition of disclosing a witness' juvenile record by either cross or direct examination is a well-recognized rule of evidence. Note 33 *supra; cf. Duttons v. Evans, supra* at 87, 27 L.Ed.2d at 226 ("His testimony . . . was admitted in evidence under a coconspirator exception to the hearsay rule long recognized under state statutory law."); *Bruton v. United States, supra* at 128 n.3, 20 L.Ed.2d at 481 n.3 ("There is not before us, therefore, any recognized exception to the hearsay rule insofar as petitioner is concerned and we intimate no view whatever that such exceptions necessarily raise questions under the Confrontation Clause."); *McCray v. Illinois, supra* at 308, 18 L.Ed.2d at 69 ("What Illinois and her sister States have done is no more than recognize a well-established testimonial privilege, long familiar to the law of evidence."). The judge's ruling somewhat hindered Davis in presenting his defense, but his trial was not "so egregiously unfair upon the issue of guilt or innocence as to

offend the provisions of the Fourteenth Amendment that no State shall 'deprive any person of life, liberty, or property without due process of law. . . .' " *Spencer v. Texas*, 385 U.S. 554, 559, 17 L.Ed.2d 606, 611 (1967). The State urges this Court to affirm the Alaska Supreme Court's holding.

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